

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
HECHINGER INVESTMENT COMPANY	)	
OF DELAWARE, et al.,	)	Case no. 99-02261 (PJW)
	)	through 99-002283
Debtors.	)	Jointly Administered
	)	
	)	
THE LIQUIDATION TRUST OF	)	
HECHINGER INVESTMENT COMPANY	)	
OF DELAWARE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 00-840-SLR
	)	
FLEET RETAIL FINANCE GROUP,	)	
et al.,	)	
Defendants.	)	

**MEMORANDUM ORDER**

At Wilmington this 1st day of December, 2004, having reviewed plaintiff's motion to disqualify Gibson, Dunn & Crutcher LLP ("Gibson Dunn") as counsel for certain defendants, the papers submitted in connection with the motion and the related evidence presented at the November 5, 2004 hearing;

IT IS ORDERED that said motion (D.I. 587) is granted in part and denied in part, for the reasons that follow:

1. **Background.** Plaintiff, the Liquidation Trust of Hechinger Investment Company of Delaware, Inc., (the "Trust"), as successor-in-interest to the Hechinger Company ("Hechinger"), has moved pursuant to Canons 4, 5 and 9 of New York's Code of

Professional Responsibility (the "Code") and the Ethical Considerations and Disciplinary Rules promulgated thereunder, to disqualify Gibson Dunn as counsel to certain former directors and officers (the "Director Defendants") of Hechinger.

2. In this action, on behalf of the Hechinger estate, the Trust asserts claims for breach of fiduciary duty against the Director Defendants stemming from their approval of a leveraged buyout of Hechinger in September 1997 (the "1997 Transaction"), which allegedly drained the company of at least \$127 million at a time when it was insolvent. Dennis J. Friedman ("Friedman"), a current Gibson Dunn partner, acted as corporate counsel to Hechinger in connection with the 1997 Transaction while he was a partner at another firm. No objection to Gibson Dunn's representation was made until June 2004, some three years after the Director Defendants were added to this litigation. According to plaintiff, its concerns were raised at a September 4, 2003 hearing before the United States Court of Appeals for the Second Circuit.

3. While the Trust was aware that Friedman was a corporate transactions partner at Gibson Dunn, certain representations were made to the Second Circuit that convinced the Trust that Friedman was breaching his (and Gibson Dunn's) ethical obligations to Hechinger and the Trust. More specifically, at the September 4, 2003 hearing, in support of a

motion to quash a subpoena issued for the testimony of Friedman, Mitchell A. Karlan of Gibson Dunn represented to the Second Circuit, as follows:

Friedman arranged for the . . . litigators of his firm to be trial counsel and **they consult** Friedman and **Mr. Friedman contributes** to Gibson Dunn's formulation of litigation strategy.

(PX 8 at 10) (emphasis added to highlight present tense).

4. The testimony evinced at the November 5, 2004 hearing is inconsistent with the above representation. Specifically, both Mr. Karlan and Mr. Friedman denied that Mr. Friedman has been an active participant in the defense of this litigation since the initial conversations that occurred upon Gibson Dunn's retention. (D.I. 654 at 32-38, 69-73)

5. Based upon the above record, I conclude that Mr. Karlan was less than candid, either in the Second Circuit or in this court, apparently characterizing the facts to suit his purposes at the moment. I am sufficiently concerned with this conduct to revoke his pro hac vice admission to practice in this court, in this case. There is no evidence that anyone else on the Gibson Dunn litigation team is responsible for Mr. Karlan's conduct; consequently, I decline to disqualify Gibson Dunn as a firm, consistent with the conditions established below.

6. I cannot tell from the record whether Mr. Friedman has been an active participant in the defense of this litigation. Assuming for purposes of this proceeding that he has not been

actively participating, which is Gibson Dunn's position in this court, there is no question that he is a fact witness with knowledge relevant to the defense of this case. Consequently, unless Gibson Dunn withdraws as counsel for the Director Defendants, I hold that Mr. Friedman's knowledge and thoughts, if shared in the future with his colleagues at Gibson Dunn, are subject to public disclosure as they are not protected by the work product doctrine or by any attorney client privilege.<sup>1</sup>

Sue L. Robinson  
United States District Judge

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<sup>1</sup>In other words, I am imposing the "Chinese Wall" that should have been imposed in the first instance when Gibson Dunn was first retained.